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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Appellant,

v.

GERARDO SANCHEZ GONZALES,

Defendant and Respondent.

E047429

(Super.Ct.No. BLF004188)

OPINION

APPEAL from the Superior Court of Riverside County. John J. Ryan, Judge.

(Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed with directions.

Rod Pacheco, District Attorney, and Ivy Fitzpatrick, Deputy District Attorney, for Plaintiff and Appellant.

Dennis L. Cava, under appointment by the Court of Appeal, for Defendant and Respondent.

Defendant and respondent Gerardo Sanchez Gonzales was charged with possession of drug paraphernalia by an inmate. (Pen. Code, § 4573.6.)<sup>1</sup> It was also alleged that he had served two prior prison terms (§ 667.5, subd. (b)) and had two prior strike convictions (§§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1)). Defendant pled guilty and admitted all of the prior strike convictions and prison prior allegations. The trial court sentenced him to a total prison term of 10 years.

The People appeal, arguing the trial court abused its discretion in granting the motion to strike one of defendant's strike convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). We agree with the People and will reverse the ruling and remand the matter to the trial court to resentence defendant.

### FACTUAL AND PROCEDURAL BACKGROUND

#### *A. Defendant's Charged Offense*

Defendant was an inmate at Chuckawalla Valley State Prison. On June 17, 2006, a prison correctional officer stopped him for a random patdown search. She observed a bulge in his sock and asked him to remove the sock's contents. Defendant had an "inmate-manufactured syringe" used to shoot heroin.

#### *B. Romero Discussion and Sentencing*

In chambers, and prior to the entry of the guilty plea, the trial court and parties discussed defendant's strike convictions. The court indicated it intended to strike one of them. As noted on the record, there was no noticed *Romero* motion filed, so the

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<sup>1</sup> All further statutory references will be to the Penal Code unless otherwise noted.

prosecutor did not have a chance to obtain a probation report to present to the court. The prosecutor and defense counsel subsequently presented their *Romero* arguments on the record. The court then took defendant's plea, and then struck defendant's robbery conviction from 1991. The court went on to impose the upper term, stating that defendant deserved it because of his prior history and his "inability to do anything close to trying to get rehabilitated."

## ANALYSIS

### The Trial Court Erred in Striking Defendant's Prior Conviction

The People contend the trial court abused its discretion when it struck defendant's prior strike conviction. Based on our review of the record and the trial court's reasoning, tested against the standards pronounced by our Supreme Court, we agree the court abused its discretion in striking the 1991 robbery conviction.

#### *A. Standard of Review*

In *Romero*, the California Supreme Court held that a trial court "may strike or vacate an allegation or finding under the Three Strikes law that a defendant has previously been convicted of a serious and/or violent felony, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385[, subdivision] (a)." (*People v. Williams* (1998) 17 Cal.4th 148, 158; see *Romero, supra*, 13 Cal.4th at pp. 507-508.) We review the trial court's ruling for abuse of discretion. (*Romero, supra*, at p. 504.) "The governing canons are well established: "This discretion . . . is neither arbitrary nor capricious, but is an impartial discretion, guided and controlled by fixed legal principles,

to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. [Citations.]” [Citation] . . .

“[A]ll exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.” [Citation]’

[Citation.] [¶] The abuse of discretion standard ‘is deferential. . . . But it is not empty.’

[Citation.]” (*People v. Gaston* (1999) 74 Cal.App.4th 310, 314-315 (*Gaston*).)

In reviewing such a ruling, we “must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams, supra*, 17 Cal.4th at p. 161.)

### B. Background

Since the trial court’s exercise of discretion is at issue in this case, we set out the court’s statements in detail. We note that, since there was no probation report obtained, the following recitation of defendant’s criminal background reflects what was articulated by the prosecutor during oral argument.

Defendant’s criminal history began in 1988, when he was convicted of receiving stolen property and possession of burglary tools.<sup>2</sup> That same year, he was also convicted

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<sup>2</sup> The prosecutor did not name the specific statutes under which defendant was convicted; however, we note that receiving stolen property is a violation of section 496, subdivision (a), and possession of burglary tools is a violation of section 466.

of misdemeanor possession of a dangerous drug without a prescription.<sup>3</sup> In 1990, he was convicted of possession of a hypodermic needle or syringe.<sup>4</sup> The prosecutor also mentioned that defendant was “involved in” numerous misdemeanor offenses, including false identification to a police officer, possession of a syringe, a probation revocation, trespass, occupying property without consent, and being a minor in possession of alcohol. These misdemeanor offenses led up to defendant’s convictions for several felonies. In 1991, he was convicted of second degree robbery (Pen. Code, § 211) and was sentenced to three years in prison. In 1993, he was convicted of auto theft (Veh. Code, § 10851) and receiving stolen property (Pen. Code, § 496), and was sentenced to two years in prison. Shortly after his release on the 1993 convictions, he was convicted of robbery (Pen. Code, § 211) with a personal firearm use enhancement (Pen. Code, § 12022.5), carjacking (Pen. Code, § 215) with a personal firearm use enhancement (Pen. Code, § 12022.5), and being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)). He was sentenced to 30 years in prison.

In addition, while in custody, defendant had numerous prison rule violations. In 2003, he tested positive for morphine and codeine. Another time, he tested positive for

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<sup>3</sup> The prosecutor did not name the specific statute under which defendant was convicted, but we note that possession of a dangerous drug without a prescription is a violation of Health and Safety Code section 11350.

<sup>4</sup> The prosecutor did not name the specific statute under which defendant was convicted, but we note that possession of a hypodermic needle or syringe is a violation of Health and Safety Code section 11364.

heroin or heroin by-products. Even after defendant's arrest in the instant case for being in possession of a syringe, he was found guilty of rule violations, including being under the influence of heroin and refusing to test under mandatory testing orders.

After hearing about defendant's criminal history, the trial court took defendant's plea and then began to explain why it decided to strike his 1991 strike conviction. The court noted that defendant's current offense of possession of a syringe in state prison was "at the low end of felonies," and stated that defendant clearly used heroin and other substances, no matter if he was in prison or out of prison. The court then said: "The current offense is neither violent nor is a serious felony. . . . There was no weapon involved in this case, no threat of violence, no victim, other than yourself. I suppose your priors, however, are violent and serious, robbery and carjacking. You have also been convicted of auto theft, possession of controlled substance, and it appears you have several drug-related and alcohol-related misdemeanors. . . . I don't think you spent a year or two years out of custody during that period of time." The court added: "And you did squeeze into a very short period of time on the street two serious crimes, as well as other important felonies. I recognize that, and I recognize that heroin, cocaine and alcohol causes a lot of people big problems. So when I'm thinking about protection of society, you are going to be a more mature adult when you finish this term so that the public will be protected. [¶] Based on the nature and circumstances of the present felony and the priors, which are very, very serious, but I believe that striking one of those priors is

within the spirit of the three-strike scheme.” The court then struck the 1991 robbery conviction.

The prosecutor objected to the court sentencing defendant without obtaining a probation report, and the court said: “What is probation going to tell me that I don’t know?” The court stated it was “assuming that [defendant] cannot rehabilitate himself.” The court then acknowledged that since 1988 defendant had not been able to stay crime free, and noted that almost all of his crimes, with the exception of the robbery and carjacking convictions, were drug or alcohol related. The court stated: “Because of your prior history and your inability to do anything close to trying to get rehabilitated, you do deserve the upper term, which is four years.” The court went on to impose a total prison term of 10 years.

### *C. The Trial Court Abused Its Discretion*

Here, the apparent reasons the court struck the robbery conviction include: 1) the current offense of possession of a syringe in state prison was “at the low end of felonies”; 2) the current offense did not indicate a great degree of danger to society; 3) the current offense did not involve a weapon, threat of violence, or a victim; 4) defendant had problems with drug and alcohol use; and 5) defendant was going to be “a more mature adult” by the time he finished his term, so the public would be protected. We “must assess whether the reasons given by the trial court are a reasonable basis for concluding that a defendant should be deemed ‘outside the scheme’s spirit’ and hence ‘treated as though he had not previously been convicted of one or more serious and/or violent

felonies,’ as explained in [*People v.*] *Williams, supra*, 17 Cal.4th at page 161.” (*People v. Strong* (2001) 87 Cal.App.4th 328, 336 (*Strong*).)

We are guided by *Strong* and *Gaston*. *Strong* held that a trial court had abused its discretion under *Romero* when it concluded a career criminal was outside the spirit of the “Three Strikes” law. “[A] defendant who falls squarely within the [Three Strikes] law’s letter does not take himself outside its spirit by the additional commission of a virtually uninterrupted series of nonviolent felonies and misdemeanors over a lengthy period. . . . [T]he Three Strikes law was devised for the ‘revolving door’ career criminal, and was expressly intended ‘to ensure longer prison sentences . . . for those who commit a felony’ as long as they were previously convicted of at least one strike. . . . Extraordinary must be the circumstance by which a career criminal can be deemed to fall outside the spirit of the very statutory scheme within which he squarely falls and whose continued criminal career the law was meant to attack.” (*Strong, supra*, 87 Cal.App.4th at pp. 331-332, fn. omitted.) “[T]he overwhelming majority of California appellate courts have reversed the dismissal of, or affirmed the refusal to dismiss, a strike of those defendants with a long and continuous criminal career.” (*Id.* at p. 338.)

In *Gaston*, the defendant was “a 44-year-old homeless person who ‘has been unemployed for the past five years,’ has passed ‘most of the past eight years in state prison or on parole’ and ‘has spent most of his life on the street . . . .’ Although ‘drug use appears to be an underlying factor in [his] criminal behavior, and in fact may be the root cause thereof,’ the record is barren of any attempts by [him] to ‘root out’ such destructive



drug dependency. Accordingly, his drug dependency does not fall into the category of mitigating circumstances. . . . [¶] . . . [¶] [H]e has committed an unending series of felonies, as well as other crimes, has been repeatedly punished for these crimes, including the service of four prior prison terms, and has failed to learn anything from the experience.” (*Gaston, supra*, 74 Cal.App.4th at p. 322.)

In the instant case, the court struck defendant’s prior conviction mainly because of the nonviolent nature of the current offense. However, “[b]y its very terms, *any* felony triggers a longer sentence under the Three Strikes law as long as the defendant has sustained at least one strike. Since the express intent of the Three Strikes law is ‘to ensure longer prison sentences’ for any defendant who has a qualifying strike and subsequently commits ‘a felony,’ the nonviolent or nonthreatening nature of the felony cannot alone take the crime outside the spirit of the law.” (*Strong, supra*, 87 Cal.App.4th at p. 344, italics added, fns. omitted.)

The court also mentioned defendant’s problems with drug and alcohol abuse. To the extent that the court considered defendant’s substance abuse to be an underlying factor in his criminal behavior, the record here, as in *Gaston*, is “barren of any attempts by [defendant] to ‘root out’ such destructive drug dependency.” (*Gaston, supra*, 74 Cal.App.4th at p. 322.) In fact, in sentencing him to the upper term, the court cited defendant’s “inability to do anything close to trying to get rehabilitated.” Accordingly, his “drug dependency does not fall into the category of mitigating circumstances. [Citations.]” (*Ibid.*)

The last reason—that defendant was going to be “a more mature adult” by the time he finished his term, so that the public would be protected—cannot take defendant outside the spirit of the Three Strikes law. (*Strong, supra*, 87 Cal.App.4th at p. 345.) The court asked how old defendant was, and the prosecutor stated that he was 38 years old. “While some courts, in considering whether to dismiss a strike, have considered age in conjunction with the length of the sentence and the defendant’s prospects, middle age, considered alone, does not remove a defendant from the spirit of the Three Strikes law. Otherwise, those criminals with the longest criminal records over the longest period of time would have a built-in argument that the very factor that takes them within the spirit of the Three Strikes law—a lengthy criminal career—has the inevitable consequence—middle age—that takes them outside the law’s spirit.” (*Ibid.*)

Furthermore, defendant’s recidivist criminal history brings him squarely within the spirit, as well as the letter, of the Three Strikes law. His criminal history dates back 21 years, when he was first convicted of receiving stolen property and possession of burglary tools. Over the years, he has sustained convictions for numerous other offenses including possession of a dangerous drug without a prescription, possession of a hypodermic needle or syringe, second degree robbery (Pen. Code, § 211), auto theft (Veh. Code, § 10851), receiving stolen property (Pen. Code, § 496), robbery (Pen. Code, § 211) with a personal firearm use enhancement (Pen. Code, § 12022.5), carjacking (Pen. Code, § 215) with a personal firearm use enhancement (Pen. Code, § 12022.5), and being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)). During his lengthy

criminal history, he had very brief periods of time between convictions. In addition, defendant's criminal behavior continued even while in custody, as he was found in possession of drug paraphernalia and used controlled substances in prison. (Pen. Code, § 4573.6.) In short, the record demonstrates two decades of continuous criminal conduct, undeterred by repeated incarcerations.

Defendant relies upon *People v. Bishop* (1997) 56 Cal.App.4th 1245 (*Bishop*) as controlling here, but such reliance is misplaced. *Bishop* predates *People v. Williams*, *supra*, 17 Cal.4th 148, and consequently did not apply the appropriate standard: whether the defendant should be deemed to fall outside the scheme's spirit. Instead, the *Bishop* court indicated the nature of the present crime and the remoteness of the defendant's prior violent offenses operated to mitigate his three strikes sentence. (*Bishop, supra*, at pp. 1250-1251.) However, the Three Strikes law provides "[t]he length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence." (§ 667, subd. (c)(3).) Thus, remoteness does not take a defendant outside the spirit of the very law that expressly rejects remoteness as a basis for avoiding the law.

Also, *Bishop* relied heavily on the state Supreme Court's decision in *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, for the scope of the trial court's right to exercise its discretion. Defendant here also relies on *Alvarez*. However, the *Alvarez* court addressed a different issue with a different scope of discretion. It addressed the trial court's unqualified discretion to determine whether to reduce a wobbler to a misdemeanor for purposes of the Three Strikes law, and it contrasted that discretion with

the qualified discretion at issue here under section 1385, subdivision (a), which, it acknowledged, was an example of a statute that “contain[ed] express qualifications delineating, and thereby restricting, the particular exercise of discretion.” (*People v. Superior Court (Alvarez)*, *supra*, at pp. 976-977.)

In sum, we do not lightly conclude that an abuse of discretion has occurred here. However, we are compelled to that conclusion because of defendant’s unrelenting record of recidivism, even while in prison. He is the kind of “revolving-door career criminal for whom the Three Strikes law was devised.” (*Gaston, supra*, 74 Cal.App.4th at p. 320.)

#### DISPOSITION

The order dismissing defendant’s 1991 strike is reversed. The matter is remanded to the trial court for resentencing.

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HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

MILLER

J.